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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER WOZNIAK,

Plaintiff,

v.

22-cv-8969 (PAE)

WARNER BROTHERS, DC COMICS,

Defendants.

New York, N.Y.  
January 18, 2024  
2:00 p.m.

Before:

HON. PAUL A. ENGELMAYER,

District Judge

APPEARANCES

LAW OFFICE OF R. TERRY PARKER

Attorneys for Plaintiff and Third-Party Defendant

BY: R. TERRY PARKER

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Attorneys for Defendant and Third-Party Plaintiff

BY: JAMES D. WEINBERGER

ANDREW NIETES

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(Case called)

MR. PARKER: Good morning, your Honor. Terry Parker for the plaintiff and third-party defendant Christopher Wozniak.

THE COURT: Very good. Good afternoon, Mr. Parker.

MR. WEINBERGER: James Weinberger, Fross Zelnick Lehrman & Zissu, for defendant Warner Brothers Entertainment and counterclaim plaintiff DC Comics.

MR. NIETES: Andrew Nietes of Fross Zelnick as well for defendant Warner Brothers, Inc., and counterclaimant DC Comics.

THE COURT: All right. Very good. Good afternoon to you, and good afternoon to the others who are here today, including our court reporter.

All right. We're about to have a summary judgment argument on the defendants' motions for summary judgment both on the plaintiff's claim as well as on the third party and counterclaims. So I'll begin with you, Mr. Weinberger, but before we get into the argument, one thing I wasn't factually clear about is just what discovery consisted of in this case. Can you just summarize what it consisted of?

MR. WEINBERGER: Well, the discovery of the plaintiff consisted of copies of the story that he claims was infringed that we were -- that he was able to get. We took his deposition. There were some other materials. He had

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1 correspondence largely about the claim that he was bringing and  
2 people he had talked to about it. Discovery of our clients  
3 included basically access to an exemplary collection of Batman  
4 works, much like the material that we've put in our motion  
5 today, with an invitation to the plaintiff to ask for more if  
6 there were more things that he wanted to see.

7 We provided him with a number of agreements, both  
8 relating to the underlying—I don't want to say the acquisition  
9 of rights by DC Comics because Batman was owned by DC Comics at  
10 inception as a work made for hire—but the underlying  
11 agreements with the creators, a number of other agreements,  
12 both relating to the development of the character over the  
13 years, the license to Warner Brothers for production of films,  
14 the agreements with the various writers and directors -- well,  
15 sorry, writer agreements related to the film, and any  
16 correspondence that related to Mr. Wozniak or his claim that we  
17 were able to find.

18 THE COURT: Were there any depositions, or what if any  
19 depositions were taken of defense side personnel?

20 MR. WEINBERGER: Sorry. So the former publisher and  
21 President of DC Comics, Mr. Levitz was deposed. Mr. Kogan, who  
22 is the chief -- head legal officer at DC Comics, was deposed.  
23 A 30(b)(6) representative of Warner Brothers was deposed.  
24 Mr. Reeves, the writer and director of the Batman film, was  
25 deposed. Terry, I don't know if I'm leaving anyone out. A

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1 cowriter -- excuse me -- Mr. Tomlin, one of the cowriters of  
2 the script.

3 THE COURT: Okay. If either of you thinks of anyone  
4 else, I would welcome knowing that. And by the way,  
5 Mr. Parker, when the time comes for you to speak, you'll need  
6 to just have the microphone closer to you. Very good. That is  
7 helpful and helps set the scene for me.

8 With that, Mr. Weinberger, the floor is yours.

9 MR. WEINBERGER: Do you want me at the podium?

10 THE COURT: As long as you are speaking into the mic,  
11 either is fine.

12 MR. WEINBERGER: Thank you. We appreciate the  
13 opportunity to be heard today. I want to run through a couple  
14 of high-level points. Our motion is set in our brief. We feel  
15 that the materials that we submitted speak for themselves. But  
16 as a preliminary matter, I think the first point I want to make  
17 is that the Wozniak declaration that was attached to the  
18 opposition to summary judgment was not, from what we can tell,  
19 signed by the plaintiff, and we noted this in our reply brief.  
20 As a result, any reference to it is improper. There's a  
21 Southern District case, *Star Industries v. A&J Construction*,  
22 that we cited in our brief. From our perspective the affidavit  
23 is inadmissible because it hasn't been signed.

24 Moving on to the substance of our claim or of our  
25 motion, from our perspective, the Court need only find that DC

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1 Comics owns Batman, and this dictates entering summary judgment  
2 in favor of our clients on both of the claims in the case.  
3 There's uncontroverted evidence in the record, much of it  
4 stipulated to by the plaintiff, that two individuals, Bob Kane  
5 and Bill Finger, created Batman in the late 1930s. These were  
6 guys who worked for DC Comics, so DC Comics owned those works  
7 as a work made for hire even though they were paid specially  
8 for it because it was a successful title.

9 As explained in the declaration of Mr. Levitz, who is,  
10 I think, the foremost living expert on experience -- sorry. He  
11 has expertise but also as a lay witness who was present for all  
12 of these events at least after the mid 1970s. Batman has been  
13 exploited in thousands of comic books, TV shows and films, and  
14 we've provided the Court with materials showing that Exhibit A  
15 of the Levitz declaration is this book, the "80 Years of  
16 Batman" book. It contains kind of seminal comics, the original  
17 Batman story, the first appearance of the Riddler, the  
18 appearance of other core elements as he has developed over  
19 time. So you see not only in this book the original Batman but  
20 how his appearance and traits evolved in the 80 years of which  
21 he has been in comics.

22 The Daniels' book, which is Levitz Exhibit, really  
23 it's very rare that I go into court and I get to point an  
24 historical document, a 20-plus-year-old book, that talks about  
25 the history of the character that we're trying to protect. And

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1 that's what this book does. And there are other comics that  
2 are reproduced here including the famous origin story of  
3 Batman, or of young Bruce Wayne, witnessing his parents' murder  
4 in an alley and developing the inspiration to become Batman  
5 later in life.

6 We've given you copies of the TV show from the 1960s;  
7 another version of Batman that is really different from the  
8 comics, more of a campy, cartoonish even though it was  
9 live-action-type version. And then some of the later films,  
10 only one of which we're relying on here, because Mr. Wozniak's  
11 alleged work was purported to be created in 1990. So only the  
12 Jack Nicholson film is relevant, but there's another example,  
13 and we've provided this to the Court of a different way that  
14 Batman can be portrayed and more nuanced kind of secondary  
15 characters. So all of that is in the record, as is the chain  
16 of title.

17 The plaintiff has raised a concern that not all of the  
18 copyright certificates referenced the plaintiff and the  
19 counterclaim plaintiff, DC Comics. But Mr. Kogan's declaration  
20 and our explanation in the brief makes clear that DC Comics is  
21 the ultimate owner of all of these works, and all of the other  
22 entities who are identified in the copyright registrations are  
23 basically predecessor entities. And there's nothing in the  
24 record to indicate otherwise.

25 THE COURT: Let me just pause and ask you something,

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1 and I know this came up in an earlier conference but just to  
2 nail down the point. I think we discussed, I think it was the  
3 premotion conference but perhaps as far back as the initial  
4 conference, the idea of owning a character. And I think you  
5 are saying that it is possible for a copyright to adhere just  
6 in a character without more if it's sufficiently delineated.  
7 Would that mean that, for example, if I marketed a bicycle or a  
8 car and called it the Batmobile, even if it bore no resemblance  
9 to the Batmobile or something like that or, you know, called a  
10 doll Batman even if it bore no resemblance to the Batman, as we  
11 understand him, that that simply by using that name would be  
12 protectable under copyright?

13 MR. WEINBERGER: Not under copyright, no, but under  
14 trademark it would be. For example, in the example of the  
15 bicycle, a bicycle called the Batmobile with no other indicia  
16 emanating from the Batman copyrighted works, it would be  
17 difficult to characterize that as a copyright infringement.  
18 There would have to be trademarks for those terms, and so there  
19 would be another avenue of relief. But I was just about to get  
20 to how that works.

21 THE COURT: Go ahead. I want to come back to it, but  
22 if you are about to go there, keep on.

23 MR. WEINBERGER: Sure. The question of character  
24 protection under copyright law, basically protection of  
25 works -- of elements from expressive works independent of the

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1 works in which they appear. So not just the story, but you  
2 take the people or the places, the fictional places, out of the  
3 story, the protection for those kinds of elements at that level  
4 has existed for decades. And there are two relatively recent  
5 cases in this district that go through all the ways in which  
6 that can happen. But basically, the two *Colting* cases, the  
7 *Salinger* case involving "Catcher in the Rye" and the *Penguin*  
8 *Random House* case, which is Judge Rakoff's decision from a few  
9 years ago, that involves the characters from the novels  
10 "Breakfast at Tiffany's," from the Hemingway novel "The Old Man  
11 and the Sea," from "On the Road" and from "2001: A Space  
12 Odyssey," all make clear that if the characters were  
13 sufficiently delineated so that basically you can tell who they  
14 are when you see them in another context, that they can be  
15 detectable independently. And we think that given the material  
16 we have provided the Court, all of which has not been  
17 controverted in the record, the substantive material, that you  
18 can make that determination.

19 THE COURT: If so, the notion would be Batman is  
20 certainly well delineated. Would that mean that literally any  
21 writing that somebody engaged in that used Batman and that  
22 picked up on that delineation in some way was protected in  
23 copyright?

24 MR. WEINBERGER: Well, I would say that it would be an  
25 infringement to write a Batman story or to create—a technical



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1 infringement—a Batman comic book without authorization of my  
2 client. Is there a world where if I --

3 THE COURT: Sure, but if I wrote a novel, you know,  
4 which in a few pages made reference to Batman crossing the  
5 field of vision, having some encounter with somebody, something  
6 like that; I mean, because I'm drawing on your client's  
7 familiar Batman, am I infringing his copyright?

8 MR. WEINBERGER: I think it would depend on the  
9 context. What I was about to say is if you wrote a novel and  
10 one of the protagonists picked up a Batman comic and the novel  
11 talks about the character's interaction with the comic book,  
12 you know, I think that's one example that would be likely not  
13 be one --

14 THE COURT: That would be fair use.

15 MR. WEINBERGER: I was going to say that would be fair  
16 use. Is there a world in which some de minimis use of  
17 Batman in some greater work might be fair use or not  
18 infringing? I suppose that's possible, but that's not this  
19 case.

20 THE COURT: In other words, to the extent that you are  
21 making the argument that the character per se is copyrightable,  
22 you need to defend that proposition only in the context of a  
23 work that is built around that character.

24 MR. WEINBERGER: That's right. That's right, your  
25 Honor.

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1           So as I was saying, we believe that based on the  
2 material we've provided and the case law regarding characters,  
3 that the determination is fairly straightforward. But the  
4 Court really doesn't have to do that if it chooses not to.  
5 We've got four cases in this circuit, one by the Second Circuit  
6 in 1982, the *DC v. Reel Fantasy* case, and that's 695 F.2d 24.  
7 And then the decisions of other Southern District judges, Judge  
8 Pauley in *Sapon*, Judge Mukasey in the *Bobtron* case from 1990,  
9 and I mean, the *Fox Publications* decision from 1942. This was  
10 only three years after Batman debuted. There probably were a  
11 couple dozen comic books when that decision was reached, let  
12 alone the thousands that have appeared since then, the film,  
13 television, et cetera. So from our perspective, I don't know  
14 that it's binding precedent, but this question has been  
15 answered over and over again by courts in this circuit in the  
16 affirmative.

17           And Mr. Wozniak knows this, and he knew it in 1991  
18 when he signed a contract that said so much. He was a  
19 freelance artist at DC Comics. He inked Batman comics,  
20 penciled -- inking and penciling are two different techniques  
21 by which art was put in comic books. That was Mr. Wozniak's  
22 chief work at DC Comics as a freelancer. And in order to get  
23 paid, he had to sign a contract that acknowledged that DC owned  
24 rights in Batman and the characters and the settings and the  
25 scenes that were portrayed in the drawings that he was doing

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1 and that he wouldn't lay claim to ownership. And he did  
2 that -- we have two examples in the record, the Kogan  
3 declaration Exhibits M and N. He knew this. He knew it at the  
4 time, so this really shouldn't be, from our perspective, a  
5 question of any controversy. And as a result, this dictates  
6 summary judgment on both of the substantive claims in the case.

7 THE COURT: Sorry, both of the substantive claims?

8 MR. WEINBERGER: The defense claim, meaning, the  
9 defense of Warner Brothers, and the affirmative infringement  
10 claim by DC Comics. I should have said --

11 THE COURT: But there's a separate claim involving the  
12 registration.

13 MR. WEINBERGER: Correct. I think it's determinative  
14 of the fraud claim as well. I should have said three claims.

15 THE COURT: Okay. But the proposition you just had, I  
16 took to refer to the two infringement claims.

17 MR. WEINBERGER: That's correct.

18 So in order to prevail on his claim against Warner  
19 Brothers, right, his claim that his story is infringed by the  
20 film "The Batman," Mr. Wozniak was required to prove that he  
21 owned a valid copyright in that story. And the case law  
22 regarding infringement and ownership is very clear—not just  
23 the case law, the statute. Section 103(b) of the Copyright Act  
24 is clear. Well, 103(a) says that no copyright ownership can  
25 extend to any preexisting material in which the material was

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1 used unlawfully. So from our perspective at the first stage,  
2 the fact that the underlying work was based on preexisting  
3 material and attempted to be exploited by Mr. Wozniak in a way  
4 that he did not have a right to do and signed a contract that  
5 said he wouldn't do, renders the entire work unlawful.

6 THE COURT: In other words, the fact that his story is  
7 from your point of view an infringement of "The  
8 Batman" copyright or of DC Comics' copyright means that story  
9 or any story that Mr. Wozniak would write about Batman is  
10 necessarily an act of infringement and therefore can't be the  
11 fulcrum on which an affirmative copyright claim is based.

12 MR. WEINBERGER: Yes. That's what Section 103(a) of  
13 the Copyright Act says.

14 THE COURT: It says "unlawful." Is unlawful defined?

15 MR. WEINBERGER: I believe it means infringement --  
16 infringing.

17 THE COURT: So what this shows is that to the extent  
18 that -- that basically makes the two claims collapse  
19 essentially.

20 MR. WEINBERGER: Yes.

21 THE COURT: If you prove up your affirmative claim of  
22 infringement, it follows that Mr. Wozniak's affirmative claim  
23 can't stand.

24 MR. WEINBERGER: That's correct, Judge. That's  
25 correct.

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1 But even if the material was not used unlawfully,  
2 103(b) is clear that copyright in a new work that is based on  
3 or utilized preexisting work cannot extend protection to the  
4 underlying material, and the reason for this is very  
5 straightforward. Copyright is for a limited term. It's set  
6 forth in the constitution that it's for a limited term. And if  
7 you could write a sequel and extend protection from the  
8 underlying work to the new work, you would basically be  
9 advancing the date by which copyright protection subsisted and  
10 theoretically advancing the length of protection, which courts  
11 have held cannot be. So never, even if the material is used  
12 with permission, if I got permission from DC Comics to do a new  
13 Batman story, it wouldn't give me copyright rights in anything  
14 that was in existence at the time.

15 THE COURT: So when does the Batman copyright expire?

16 MR. WEINBERGER: I believe 2033, the original comic,  
17 the original comic, the first comic.

18 THE COURT: Do the math. How does that play out?

19 MR. WEINBERGER: Well, I'm not going to get my dates  
20 right because 1909 Act dates work differently than 1978.

21 THE COURT: Right.

22 MR. WEINBERGER: It's less complicated but at some  
23 point in the next I think it's 11 or 12 years, the copyright in  
24 the original—the first Batman comic—will expire.

25 THE COURT: Okay. And successive works let's say by

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1 DC Comics --

2 MR. WEINBERGER: Every year.

3 THE COURT: Every year.

4 What about the concept of "The Batman" though? "The  
5 Batman," if you will, I think you are saying, has been  
6 sufficiently delineated since the 1930s; does that mean that  
7 your copyright in that concept similarly would expire in the  
8 next several years?

9 MR. WEINBERGER: Well, it's not the concept per se.  
10 It's the expressive traits and elements that have been -- in  
11 which pen has been put to paper as it's been developed over  
12 time. Honestly, I'm not sure I could really answer that  
13 question. Personally, I think that it would become less  
14 protectable over time, but that's not an issue that we're  
15 dealing with in this case.

16 THE COURT: Right. I mean, to the extent that the  
17 copyright in the original Batman would expire with  
18 hypothetically the first expiration of a Batman-based work, and  
19 that's just a hypothetical, that date hasn't hit yet?

20 MR. WEINBERGER: Correct.

21 THE COURT: Okay. Go ahead.

22 MR. WEINBERGER: So the point I was making was that  
23 whether you determine that the Wozniak story is infringing or  
24 not, either way, it cannot give him rights to Batman material  
25 that predated his story. It cannot as a matter of statutory

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1 language.

2 THE COURT: So let me ask you this. Just indulge a  
3 hypothetical that is an extreme version of what he is claiming  
4 happened here. Yes, he has a working relationship with Warner  
5 Brothers -- with DC Comics, I guess. Let's suppose he came up  
6 with just a killer, great, new Batman story but based on Batman  
7 and turned it into Warner Brothers, DC Comics, the two of them  
8 together, and then in a shameless, you know, ripoff, Warner  
9 Brothers then built a film that was all but verbatim based on  
10 what Mr. Wozniak did.

11 From your perspective, I think you are saying to me  
12 that he is out of luck because he is ultimately exploiting a  
13 protected character that he has no intellectual property rights  
14 in and that your client, DC Comics, does. And therefore, law  
15 of the jungle, your client gets to make complete use of  
16 verbatim of what Mr. Wozniak did. Can that really be so? I  
17 mean, that's logically what you're saying.

18 MR. WEINBERGER: I don't think we're saying anything  
19 that extreme.

20 THE COURT: No, no. You haven't articulated it, but  
21 it largely follows from your disqualification theory that if he  
22 is building a story around a character that somebody else owns  
23 and he doesn't, he is out of luck from the jump.

24 MR. WEINBERGER: So I think that is there a world in  
25 which a writer can prepare a script for a film that

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1 incorporates protectable characters owned by somebody else, and  
2 then without prior contracts being signed, where  
3 acknowledgments were made, where the use of the ultimate script  
4 is slavish, and most importantly, where you could parse out,  
5 basically remove, the underlying copyrightable elements that DC  
6 owns from that script and have it still maintain some  
7 copyrightable expression, I think there is a world, if access  
8 is proven and you could show similarity, where a plaintiff in  
9 that situation might theoretically have a claim. This is not  
10 that case.

11 THE COURT: I understand.

12 MR. WEINBERGER: I don't mean to suggest that it  
13 cannot exist.

14 THE COURT: All right. But the way in which you put  
15 the theory certainly lent itself to that. You're now  
16 qualifying it. The way you had articulated it would have said,  
17 in effect, if you are building a story around our Batman, you  
18 can never claim infringement based on somebody else's use of  
19 that story.

20 MR. WEINBERGER: Well, I don't know that we've ever  
21 said never. I do think that in this particular case, we've got  
22 a plaintiff who created a work that was not solicited. It was  
23 not requested. He brought it to somebody.

24 THE COURT: Whether solicited or not, suppose he in an  
25 unsolicited way gave you a fabulous Batman story, and your



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1 client proceeded to then publish it and build a movie closely  
2 around it. Solicited or not, I take it you are backing away  
3 from the theory that there would be automatically no  
4 possibility of a viable copyright infringement claim?

5 MR. WEINBERGER: I don't know that I could answer the  
6 question that -- again, I don't think there's a world where no  
7 way that could ever be a claim. Again, if you could take a  
8 script and remove all of the Batman elements from it and still  
9 have the work be freestanding, which is a fact-sensitive  
10 exercise, in theory, I think such a claim could exist. I just  
11 don't think it does.

12 THE COURT: Is there any case law that supports the  
13 exercise you are proposing would have to be done, which is to  
14 say, you extract the component of the new story that is  
15 protectable, for example, the delineated Batman character, and  
16 then look to see whether the residue itself is infringing? I  
17 mean, there's a logic to what you're saying, but does that come  
18 from the case law?

19 MR. WEINBERGER: All of the cases say that  
20 effectively, that that is what you are required to do a  
21 copyright infringement analysis. When you look at the  
22 plaintiff's work and compare it to the defendant's work, you  
23 must remove from that analysis preexisting material,  
24 unprotectable material and ideas and conduct your analysis with  
25 that filtration.

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1 THE COURT: So if we remove the Batman character and  
2 perhaps even with it some Batman scenes, but there's some other  
3 scene. There's a love scene between two other people that is  
4 copied by your client hypothetically. Mr. Wozniak in that  
5 circumstance would be able to claim copyright infringement  
6 because in effect something that is not tainted by the  
7 Batman ownership has been copied.

8 MR. WEINBERGER: In theory, yes. And in this case, we  
9 actually have that in a roundabout way. When I deposed  
10 Mr. Wozniak, I asked him some questions about whether he felt  
11 he could publish this story, the story that is the allegedly  
12 infringed story, without the permission of DC Comics. And in  
13 answering that question, he revealed that, in fact, he had  
14 taken the story to another publisher, not DC Comics, during the  
15 course of his attempting to get it published. And I asked him,  
16 I said, well, what did you do? Did you bring them a Batman  
17 story that DC Comics hadn't approved? He said, oh, no, I took  
18 Batman and all of the Batman elements out, and I created  
19 basically a clean -- I don't want to use the word clean.  
20 That's not fair, but he created a non-Batman version of the  
21 story. He inserted a character -- one of the characters owned  
22 by the publisher. He was pitching to a character named  
23 ShadowHawk, and I think his testimony is that the remainder of  
24 the names, he just made up names of people who didn't exist.

25 THE COURT: Is there in the record of a copy of what

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1 he gave to the other publisher?

2 MR. WEINBERGER: Yes. This is Exhibit G to my  
3 declaration.

4 THE COURT: You are not contending that they are  
5 infringing because they get rid of Batman, correct?

6 MR. WEINBERGER: That's correct.

7 THE COURT: Because in effect from your perspective,  
8 in what you regard as admission by the plaintiff, his  
9 extricating the Batman component reflects his awareness of what  
10 the ground rules were.

11 MR. WEINBERGER: That's right. And this version of  
12 the story—we call it the ShadowHawk version because that's the  
13 character he put in Batman 's place, which, again, is in the  
14 record at Exhibit G—it's actually a very useful tool for the  
15 Court. The exercise of unseeing what you've seen in the  
16 filtration process that the Court has to undertake in doing the  
17 infringement analysis is very difficult conceptually, but  
18 Mr. Wozniak has done this already. It's sitting there in the  
19 record. We have a version of this story without Batman.

20 Now, that's not necessarily the only thing that has to  
21 be done. You still are required -- the Court is still required  
22 to filter out other unprotectable elements or ideas from the  
23 script when doing the analysis. But we think the proper point  
24 of comparison in the case is the ShadowHawk version against the  
25 film.

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1 THE COURT: Because the ShadowHawk version from your  
2 perspective is actually faithful to the law of copyright?

3 MR. WEINBERGER: It is -- well, I can't speak what  
4 it's faithful to, but it doesn't include any Batman elements.

5 THE COURT: It's not infringing your rights even if  
6 it's violating somebody else's.

7 MR. WEINBERGER: That's correct. I know Mr. Wozniak  
8 has not claimed that this version of the story is infringed.  
9 That's not one of the claims in the case, so I'm not suggesting  
10 that that is the claim. But it's the tool to conduct the  
11 analysis between the story and the film.

12 THE COURT: Each of you, in claiming infringement, is  
13 seizing on the Batman elements as opposed to the exogenous  
14 storyline?

15 MR. WEINBERGER: That's right. That's right. In  
16 fact, that's one of Mr. Wozniak's defenses to the DC  
17 infringement claim is that his story doesn't copy any  
18 particular DC story. But that's beside the point.

19 THE COURT: Let me come to your affirmative copyright  
20 infringement claim. I understand the theory that your client,  
21 DC Comics owns the Batman figure and some of the associated  
22 features of the narrative and that the story, as allegedly  
23 prepared in 1990, infringes that.

24 Suppose that Mr. Wozniak just held on to that in his  
25 own home, having written up the story, as opposed to presenting

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1 it to DC Comics affiliate or partner Warner Brothers. Suppose  
2 he did that. Would there be a completed act of copyright  
3 infringement if he just kept it in his own living room?

4 MR. WEINBERGER: This is a complicated question, and  
5 it doesn't just apply to my client, it applies to everybody.  
6 In the days before we had digital music, we all made mixtapes  
7 off of records and CDs and created them for ourselves.

8 THE COURT: Well, there's a statute of limitations  
9 that protects you on what you just said.

10 MR. WEINBERGER: Yes, I think so, an age-related  
11 statute.

12 The act of creating a copy of something is,  
13 technically speaking, an infringement. But a practice has  
14 developed, for example, among the record industry, not to sue  
15 people for making copies of things in their homes whether it's  
16 because of fair use, whether it's de minimis, or whatever  
17 reason it is, such that I don't believe there's any case that  
18 stands for the proposition that a record company that sues an  
19 illegal downloader years later could be hurt by the fact that  
20 that person might have made an illegal copy in their home 20  
21 years before.

22 THE COURT: And this is why ASCAP doesn't go after  
23 people humming on the street.

24 MR. WEINBERGER: That's right. And also because it's  
25 wildly impractical. My client as set forth in the declarations

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1 that we've submitted, DC has a policy. Not only does it not  
2 use fans who sit at home and do this sort of thing, otherwise,  
3 my sons, when young, would have been infringers for doing  
4 drawings. But my client generally does not enforce against  
5 people who are not exploiting the properties commercially.  
6 That's their demarcation point.

7 THE COURT: But as a matter of law, it's not  
8 necessary, from your perspective, that Mr. Wozniak offered, if  
9 you will, his work -- well, what's the point at which what  
10 Mr. Wozniak does becomes copyright infringement from your  
11 perspective?

12 MR. WEINBERGER: I think if you are looking at it  
13 purely technically without any regard to industry or practice,  
14 the act of creating the story was infringement. But the  
15 context was important, right. He was creating it as somebody  
16 who spent time at DC Comics. Whether or not he received  
17 specific authorization, he felt that he had authorization to  
18 create it. And certainly when it was given to DC for  
19 consideration, the response wasn't you are an infringer, stop.  
20 It was, you know what, we don't want to use this.

21 THE COURT: All right. So it's 1990 that he develops  
22 the story, and when is it that he says he brought it for  
23 consideration?

24 MR. WEINBERGER: Around that time.

25 THE COURT: Why isn't this time-barred?

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1 MR. WEINBERGER: Because at that point—and he  
2 testified to this effect—he didn't think he had any rights to  
3 publish it without DC's permission. The act of creating a  
4 story and being told no, and then you go home and put it in  
5 your drawer. It's commercially irrelevant to my client. If  
6 that was an act of infringement that obligated my client to  
7 sue, my client would be in the lawsuit business, not the comic  
8 book business, because this sort of thing in theory happens all  
9 the time.

10 THE COURT: Right. And I appreciate your client's  
11 restraint and not in 1990 or so taking any action. The  
12 question is what is it that allows your client circa 2020 to  
13 claim that an act of copying that occurred around 1990 is  
14 actionable?

15 MR. WEINBERGER: Well, it's 2022, and it's the day  
16 that Mr. Wozniak claimed rights in this story, that he could do  
17 something with it without DC Comics. It's effectively his  
18 infringement claim is tantamount to an ownership claim that he  
19 owns Batman. Because if he doesn't own Batman, he has nothing  
20 to sue over.

21 THE COURT: Right. But where I'm going is I fully  
22 understand the spirit of your defense against his infringement  
23 claim. The question is if essentially what he's doing is he is  
24 claiming ownership not by trying himself at this point to do  
25 anything with the story, but rather to get relief from Warner

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1 Brothers, why is it that that makes for a non-time-barred claim  
2 of copyright infringement brought by DC Comics?

3 MR. WEINBERGER: Well, I think it's both my client's  
4 expectation and understanding at the time, this was someone who  
5 had done work and had signed agreements saying that he  
6 wasn't claiming rights to ownership. So there was simply  
7 nothing about his preparation of the story in the hope that it  
8 got published, which would trigger some sort of obligation to  
9 sue once my client declined effectively publication of its own  
10 material, right. It's its own material, so there was nothing  
11 to do at that point.

12 I would say that if Mr. Wozniak, with my client's  
13 knowledge, had gone out in 1995 and pitched the Batman story  
14 that he wrote to Marvel and my client became aware of it, that  
15 would have probably triggered a claim. And that would have  
16 been a problem, but that's not what happened here.

17 THE COURT: If he had done that in 1995 and whatever  
18 the result of that was, fast forward 27 years, and in 2022,  
19 uses his ownership of the story as a basis for an affirmative  
20 lawsuit against Warner Brothers, you would be saying that's a  
21 separate, fresh restarting of the statute, a separate act of  
22 infringement?

23 MR. WEINBERGER: No. Actually, I was saying the  
24 opposite. I was saying that if Mr. Wozniak had tried to sell  
25 the story in a public way with the Batman elements to a third



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1 party, and my client hadn't done anything about it, I could see  
2 that as a situation where the statute of limitations about his  
3 claim to ownership had run. Because he would have made a  
4 public statement, that my client was aware of, that he owns  
5 Batman, but he never did that until 2022.

6 THE COURT: Right.

7 MR. WEINBERGER: That's the point.

8 THE COURT: What is he doing to infringe in 2022?

9 MR. WEINBERGER: He's seeking to --

10 THE COURT: I mean, he's not trying to publish his  
11 story. He's trying to stop somebody else from, from his  
12 perspective, infringing that story.

13 MR. WEINBERGER: Without getting into what I view as  
14 settlement negotiations, he is trying to extract a monetary --  
15 well, he is trying to extract something from what he views as a  
16 publication of his story by my client without authorization.

17 THE COURT: By your client, Warner Brothers?

18 MR. WEINBERGER: Yes.

19 THE COURT: And how is that a copyright infringement  
20 of DC Comics? Is it because only DC Comics can -- if Warner  
21 Brothers is doing something wrong, only DC Comics can vindicate  
22 the right?

23 MR. WEINBERGER: Correct.

24 THE COURT: And so, by stepping ahead of DC Comics to  
25 try to extract legal relief for infringement of copyright owned

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1 only by DC Comics, he's misappropriating --

2 MR. WEINBERGER: He's seeking to exercise one of DC's  
3 exclusive rights under Section 106 of the Copyright Act.  
4 That's right.

5 THE COURT: Supposing you prevail on this affirmative  
6 copyright infringement claim, you're seeking summary judgment  
7 only on liability. What happens with damages?

8 MR. WEINBERGER: Well, in theory there's a trial.  
9 Whether my client would pursue it, I don't know. There's a  
10 statutory damage election that is available should we choose to  
11 elect it, or we could argue for actual damages.

12 THE COURT: Have you done any discovery on actual  
13 damages?

14 MR. WEINBERGER: It's effectively our attorneys' fees  
15 in this case, Judge.

16 THE COURT: Explain.

17 MR. WEINBERGER: Well, the harm to my client has been  
18 having to defend this claim, so it's effectively our fees.  
19 They are not complete yet.

20 THE COURT: Your harm to? Sorry, I want to parse  
21 which client.

22 MR. WEINBERGER: Harm to Warner Brothers.

23 THE COURT: But it is DC Comics.

24 MR. WEINBERGER: Sorry, harm to DC Comics. Same  
25 difference.

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1 THE COURT: Not necessarily the same difference. That  
2 is the point. I mean, if you are bringing a damages claim for  
3 your affirmative copyright infringement claim, that can't be  
4 brought by Warner Brothers.

5 MR. WEINBERGER: No, I understand, Judge.

6 THE COURT: You are not defending a claim against DC  
7 Comics. It's a separate entity you're defending here.

8 I don't know if you've even been parsing your fees  
9 separately by client, but how is it that your defense of Warner  
10 Brothers would be a recoverable species of damages on your  
11 affirmative copyright infringement claim based on DC Comics?

12 MR. WEINBERGER: So I have not looked at this  
13 recently, but my memory and my belief—and this is not in the  
14 record, so I am speaking off the top of my head—is that  
15 there's likely an indemnification obligation because Warner  
16 Brothers is the licensee and DC is ultimately responsible for  
17 this claim.

18 THE COURT: All right. Other than through an  
19 indemnification theory, is there anything other than statutory  
20 damages that could be available?

21 MR. WEINBERGER: Not that I can think of off the top  
22 of my head, Judge, no.

23 THE COURT: Okay. Can we pivot to the registration  
24 claim? What is the relief you are seeking on that claim? Is  
25 it to void the registration?

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1 MR. WEINBERGER: Yes.

2 THE COURT: Anything else?

3 MR. WEINBERGER: No.

4 THE COURT: I was surprised to learn from your brief  
5 that to void a registration, apparently fraud needs to be  
6 shown; is that correct?

7 MR. WEINBERGER: There is -- I don't personally agree  
8 with it, but there's a recent body of case law, including a  
9 Supreme Court case involving fabric designs, that hold that  
10 basically mistakes in connection with a procurement of a  
11 copyright registration -- you check the wrong box. You fill  
12 out the visual work form when you meant to fill out the  
13 literary text form. Filing for copyright registration can be  
14 very complex, and there's a body of case law that has developed  
15 that basically says little mistakes on applications don't  
16 deprive you of rights.

17 THE COURT: Sure. But in the patent world, if I  
18 remember right, if you fail to identify important prior art,  
19 even if it's done out of complete ignorance and there's no  
20 scientist, I think that can result in voiding the patent. No?

21 MR. WEINBERGER: I'm not a patent lawyer, but I  
22 believe that is right, too.

23 THE COURT: Why is it different in the context of  
24 copyright?

25 MR. WEINBERGER: Because often the copyright

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1 registration, while it does allow you to get into court—you  
2 cannot get into court without one—it doesn't carry with it the  
3 same evidentiary presumptions and benefits that a patent  
4 certificate does.

5 THE COURT: You are saying there's no presumption  
6 because the registration is filed more than five years after  
7 the story is created?

8 MR. WEINBERGER: That's right in this particular case.  
9 But the general rule about copyright registrations is while  
10 they create a presumption of ownership, they are not as  
11 powerful as a patent claim. The Court will kind of look at  
12 works that are registered fresh, the way that a Court that is  
13 looking at a patent really has to give some deference to the  
14 PTO. It's not the same kind of substantive determination that  
15 the patent office or even the trademark office would give.

16 However, in the event that a registrant goes to the  
17 copyright office with a sequel to Star Wars but doesn't  
18 disclose that, A, it is in fact a sequel, and, B, it was made  
19 without permission, the copyright is not going to register  
20 that. And that's the standard. The question is whether the  
21 copyright office would not have registered the work but for the  
22 lack of disclosure and whether the disclosure was intentional.

23 THE COURT: Okay. But, look, as to this one, what you  
24 are saying was undisclosed is essentially the whole prior  
25 history of Batman and this registrant's prior working history

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1 with DC Comics, right?

2 MR. WEINBERGER: That's right.

3 THE COURT: So how can anybody at the copyright office  
4 have not known about Batman?

5 MR. WEINBERGER: Well, it didn't say Batman in the  
6 title. I believe it was called "The Ultimate Riddle" when he  
7 applied for it.

8 THE COURT: But the content of the story is about  
9 Batman, right?

10 MR. WEINBERGER: Yes, but they --

11 THE COURT: In other words, you are not suggesting  
12 that the neutered version that was called ShadowHawk was what  
13 was registered. It was the Batman version, right?

14 MR. WEINBERGER: That's right. I can't speak to what  
15 the copyright office does or doesn't do. There's times when I  
16 applied for copyright registration where I expected pushback  
17 and have not gotten it and vice versa. The process of whoever  
18 reviews it, that is not something that I am able to speak to.  
19 I can tell you that it's inconsistent.

20 THE COURT: Okay. Put aside for a moment what makes  
21 the nondisclosure here fraudulent as opposed to materially  
22 incomplete. And you are telling me materially incomplete  
23 doesn't cut it to void a registration?

24 MR. WEINBERGER: Correct.

25 THE COURT: What you are saying makes it materially

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1 incomplete is leaving out the full -- any reference to the  
2 existing copyrights, vis-a-vis Batman, and leaving out his,  
3 Mr. Wozniak's, relationship to DC Comics and Batman, correct?

4 MR. WEINBERGER: Yeah. Mr. Wozniak is in a different  
5 place than most people because of his history as a freelancer,  
6 because of the agreements that he signed, and because of his  
7 knowledge of the industry. You know, it may be a recording  
8 artist submits a recording of a song that has a small sample in  
9 them, but it's something that somebody did at home and they  
10 don't know that you need permission to get that sample and use  
11 it. Would that situation be a fraudulent procurement of a  
12 copyright registration? My guess is probably not.

13 Here we have an applicant who had signed agreements  
14 saying that he knew that not only that these properties were  
15 owned by other people, but that he was not permitted to be  
16 filing it. That's different.

17 THE COURT: What does he admit that helps support your  
18 claim of fraud? The reason I ask is on summary judgment,  
19 fraudulent intent is one of those elements in which a Court has  
20 to be hesitant on affirmatively granting summary judgment.  
21 It's one thing to grant summary judgment in saying there's not  
22 enough evidence on which a finder could find fraud. It's  
23 another thing entirely to say the finder of fact has to find  
24 fraudulent intent. That's not impossible but more of a lift on  
25 summary judgment. So what is it that Mr. Wozniak has admitted

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1 that from your perspective is checkmate as to his fraudulent  
2 intent?

3 MR. WEINBERGER: Yeah. I mean, I think, first of all,  
4 he admitted that he signed these contracts and they say what  
5 they say. The language --

6 THE COURT: Back in?

7 MR. WEINBERGER: 1991 and 1992, around the time that  
8 the story was created. But his testimony, I think, speaks for  
9 itself. I know we hear from him today to say, well, how would  
10 I know I had to do that? But every answer he gave at his  
11 deposition, all of his communications about what he was trying  
12 to do when he wrote this story was write a Batman story. He  
13 testified that he knew. He knew he couldn't take it to any  
14 other publisher unchanged without DC's authorization. He knew  
15 he couldn't do that. That testimony is cited in our brief and  
16 it's attached to my declaration. And frankly, whatever he is  
17 saying now in the face of those admissions and these contracts,  
18 I don't think is plausible.

19 THE COURT: Do we have a copy in the record of his  
20 registration? There was a front piece, if you will, that we  
21 have. It's docket 66-6. It's this public catalog. I'm  
22 holding it up. But couldn't find at least what lay beneath,  
23 which is the full registration. Is there more to it than just  
24 these handful of words?

25 MR. WEINBERGER: I think there is a certificate, but I



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1 doubt that it says something that is not on that paper. I will  
2 check the record and see if I can find it.

3 THE COURT: One question would be what the  
4 instructions were to Mr. Wozniak at the time. If all he fills  
5 out are these limited things: Type of work, registration  
6 number, application title, description, claimant, date of  
7 creation, et cetera, if all he is filling out are these little  
8 SAT application form bubble-type things, what is it about the  
9 form that essentially notifies him that there's some obligation  
10 to supply that type of context you are saying was missing?

11 MR. WEINBERGER: Because when you file these  
12 applications you do so electronically. You go to the copyright  
13 office website, and there are steps that must be taken before  
14 you can go to the next screen. One of the screens is:  
15 Identify any material that you are not claiming ownership and  
16 explain yourself. So there's a box to check and a little  
17 drop-down window where you can write something if you choose  
18 to.

19 THE COURT: Sorry. But identifying the material you  
20 are not changing ownership, too, but I mean that could be, you  
21 know, "Of Mice and Men."

22 MR. WEINBERGER: Exactly.

23 THE COURT: No, no. In other words, it could be  
24 things that have nothing to do with Batman. From his  
25 perspective, he is only claiming ownership to the story. What

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1 is it that tells him that would put him on notice that it's  
2 fraudulent not to say at the same time, I'm not claiming an  
3 interest in the following Batman movies or writings?

4 MR. WEINBERGER: Honestly, you do not even have to say  
5 the following Batman movies. You can if you choose to, but you  
6 must pass a screen that says: If your work contains  
7 preexisting material, identify it by type, text, images, sound  
8 recordings.

9 THE COURT: That's the question.

10 MR. WEINBERGER: There are boxes to check, and he  
11 passed them.

12 THE COURT: Where are those boxes in the record before  
13 me?

14 MR. WEINBERGER: I'd have to --

15 THE COURT: Your notion of fraud gets inferred by the  
16 questions or prompts that are put to him not by this rather  
17 bare bones filing here.

18 MR. WEINBERGER: I would have to look for the original  
19 certificate. The boxes would be on that certificate if that's  
20 what was issued. If not, there is no record of them because  
21 they existed electronically when he filed.

22 THE COURT: I know that. But you are asking me on  
23 summary judgment to find that no reasonable finder of fact  
24 could find anything other than he had fraudulent intent, but  
25 the basis of which you are asking that fraudulent intent be

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1       inferred is based on cues and prompts that I don't see in the  
2       record here.

3               MR. WEINBERGER: I understand that, Judge. I can only  
4       say this, and I am fully aware that I am not a witness, but had  
5       he checked the box, it would have so said here on Exhibit F.

6               THE COURT: I know that, but there's no witness. I  
7       mean, think about how I am to write the decision you're asking  
8       me to write that explains why a finder of fact would have had  
9       to find this. There's nothing I think I can point to in the  
10      record that substantiates what was before him at the time he  
11      filled out the form. How does that question not just simply go  
12      to a jury? He's not moving for summary judgment against your  
13      claim, so we don't have to deal with that. But on the question  
14      of why a jury would have to find for you, I don't see how one  
15      would get there without a portrait of what the prompts and  
16      instructions were to him.

17              MR. WEINBERGER: I understand your point, Judge. We  
18      can look at the record while Mr. Parker is talking and see if  
19      we can come up with --

20              THE COURT: Okay. I'm not inviting the record to be  
21      supplemented.

22              MR. WEINBERGER: I understand.

23              THE COURT: We are at where we're at. But would you  
24      agree with me that if the record does not contain a basis --  
25      maybe he admits it. Maybe he admits what the prompts were. I

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1 don't think anyone has said that to me. But if the record does  
2 not supply a reliable basis on which to reconstruct what the  
3 instructions were, what the prompts were, what the questions  
4 were, is there some way I can find fraudulent intent on summary  
5 judgment?

6 MR. WEINBERGER: I have to think about that. I have  
7 to think about that.

8 THE COURT: All right. Okay. Very good. Thank you  
9 very much.

10 Let me ask our court reporter. Do you need a break?

11 Mr. Parker, over to you.

12 MR. PARKER: Thank you, your Honor. I don't have  
13 quite as much experience in copyright law as my colleague  
14 Mr. Weinberger, but I have practiced in this court long enough  
15 to see what really good lawyering results in bad law. And I  
16 think that's kind of what we have here.

17 THE COURT: On whose part?

18 MR. PARKER: I would on Mr. -- I think that, you know,  
19 DC Comics and Warner Brothers are well represented here. And  
20 when I tell my kids that my client wrote a Batman story --

21 THE COURT: Can you sit down? That way I can see  
22 everybody, and there's no need for you to stand. Go ahead.

23 MR. PARKER: So when I tell my kids that my client  
24 wrote a Batman story, when I tell my kids that the story  
25 includes the Riddler, the Joker, a character named Alfred, a

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1 character named Commissioner Gordon, they say, yeah, you can't  
2 do that. All right. These guys own Batman.

3 But that's not the law. That's not the law. We have  
4 to look at the statute, and we have to look at the precedential  
5 decisions that are relevant to this case, and we'll see that  
6 Congress and courts have set really strict limits for what is  
7 protected by copyright law. If we look at the statute, we see  
8 that copyright protection under Section 102, I believe, is  
9 limited to original expressions of authorship fixed in a  
10 tangible medium.

11 If we look at the Supreme Court, we see that DC Comics  
12 has to do more than show that this is a Batman story. They  
13 have to do more than show that there are characters named  
14 Alfred, there are characters named the Riddler.

15 THE COURT: Sorry. What you are beginning with is a  
16 defense of the copyright --

17 MR. PARKER: I apologize. I --

18 THE COURT: One moment. What you are starting with,  
19 you brought this lawsuit, and what was striking to me was that  
20 by the time we got to summary judgment briefing, you're  
21 completely on defense. You're basically, as you are today, you  
22 are starting off defending your client against the counterclaim  
23 by DC Comics of copyright infringement, right? I mean, that's  
24 what you're saying to me. That's what you are addressing right  
25 off the bat.

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1 MR. PARKER: Your Honor, I am beginning off the bat  
2 discussing DC Comics' claims against my client. I am not  
3 starting off on the defensive, or I certainly don't see it that  
4 way, because of the way the defense that Warner Brothers is  
5 asserting is intertwined with the claims that DC Comics is  
6 asserting. And I think without these claims that DC Comics  
7 has, the Warner Brothers case kind of falls apart. So that is  
8 why I'm beginning with the DC Comics claim.

9 THE COURT: Okay.

10 MR. PARKER: I certainly don't intend to imply that my  
11 client is in a weak position.

12 THE COURT: Okay. Go ahead.

13 MR. PARKER: So I think what we have to do is we have  
14 to look at how the law typically works in these situations and  
15 what limits that there are to copyright protection. And that's  
16 in the statute, but also, I think the Supreme Court has said  
17 that DC Comics -- or I know that they have said in the *Feist*  
18 decision—and it's cited in all of the circuit courts—is that  
19 DC Comics has to prove that it owns a valid copyright, and it  
20 has to prove that my client has unlawfully copied constituent  
21 elements that are protected by copyright law. So that's how we  
22 should be looking at this.

23 We shouldn't be asking ourselves: Is this a  
24 Batman story? We shouldn't be asking ourselves: Did my client  
25 once sign a contract with DC Comics that acknowledged DC Comics

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owns preexisting material. If we go back and look at the work-for-hire agreements --

THE COURT: Sorry. But let's come back to the issue as you framed it. It's not disputed that DC Comics owns a valid, indeed, multiple valid copyrights that relate to Batman, correct? There's no doubt it has got copyrights in this space. Put aside the details. Correct?

MR. PARKER: Correct.

THE COURT: So the issue then boils down to whether your story infringes on protectable elements.

MR. PARKER: I think that's certainly an important part of it, but I think there are issues with respect to summary judgment. There are issues as to whether or not we have ownership of a copyright that is at issue here. And this has been pointed out in -- one way to show ownership of a copyright rather than just to assume that they own it, which I think we're all sort of doing here but we can't do that.

In order to establish the ownership, you can show or offer a certificate of registration from a U.S. Copyright Office. That's a *prima facie* case of ownership. DC Comics has pointed to a number of certificates, but none of these -- only two of these list the DC Comics that is a party to this litigation as a copyright claimant. So that, to me, is a factual query. That to me is --

THE COURT: What's the factual query? If there are

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1 two --

2 MR. PARKER: How do you own this?

3 THE COURT: If there are two, the certificate supplies  
4 *prima facie* ownership. You have said there are two, at least,  
5 in the record that DC Comics has filed. What's the point,  
6 there needs to be more?

7 MR. PARKER: They need to be tied to what my client is  
8 copying, and we don't see it tied. We don't see a  
9 connection between -- so if we look at the two that do list DC  
10 Comics as a claimant, we don't know what copyrights we're  
11 talking about. What has my client copied from these works?  
12 Now --

13 THE COURT: Well, I thought what you were saying was  
14 that -- I mean, they are saying that in the context of Batman,  
15 the well-delineated figure Batman, period full stop, is a  
16 protectable element of their copyrights which your client has  
17 infringed on. I think they go a little deeper than that  
18 because they've got other associated characters and tropes that  
19 are with that, but they are basically saying, given how well  
20 delineated Batman is, that alone is protectable.

21 So I'm happy to hear your rebuttal of that, but it's  
22 not for a failure of articulation by them of what they are  
23 claiming is protectable.

24 MR. PARKER: Your Honor, I think it is. I think we  
25 have to identify the copyrights that are at issue. I will



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1 accept that the Batman character is sufficiently delineated.  
2 We still have to look at, you know, which work are we talking  
3 about? Where has my client copied a work that has been  
4 registered and is protected by copyright law?

5 THE COURT: Sorry. Wait a minute. If it's conceded  
6 that the Batman figure is sufficiently delineated, and if the  
7 Batman figure is at the center of at least two  
8 Batman copyrights that have been registered, isn't then the  
9 issue of whether your work, the story, essentially uses that  
10 sufficiently delineated character? Why does one have to go any  
11 further?

12 MR. PARKER: I think we have to be more formalistic  
13 than that. I think we have to look at the works that are  
14 registered and to see, you know, what is the copyrighted work,  
15 and how is it copied.

16 THE COURT: All right. You know what the two are  
17 because you've indicated you are aware of what the two are.  
18 What is it that is different about the Batman figure, let us  
19 say, in those two works from the story?

20 MR. PARKER: I don't know what elements of those two  
21 works are being protected by DC Comics.

22 THE COURT: Well, the Batman figure, does it look  
23 different, behave different? Is it the familiar thing with the  
24 black pointy costume? You tell me. Is there something  
25 different? I appreciate that the exercise has to be gone

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1 through, but I'm asking you to lead me through the exercise  
2 that in a way from your perspective leads to an outcome other  
3 than infringement.

4 MR. PARKER: I think, your Honor, we can move then --  
5 well --

6 THE COURT: I'm asking you to make the argument.

7 MR. PARKER: Right, I understand. And I'm not sure  
8 which elements they are pointing to in those works. We can  
9 assume that, yes, it is Batman from the Batman universe. We  
10 can assume that it is the Batmobile with weapons. We can  
11 assume that it is these different names that are referenced in  
12 the summary judgment papers. But my point is I don't think  
13 anything in the summary judgment papers is being pointed to  
14 that is being protected by copyright.

15 THE COURT: Wait a minute. A moment ago, you, I  
16 thought, conceded that the Batman figure is sufficiently  
17 delineated to be protected by copyright. So if one starts with  
18 that, are you or are you not using in your work, the story,  
19 that delineated Batman figure?

20 MR. PARKER: I don't think that the Batman is  
21 sufficiently delineated in my character -- my client's story  
22 such that it is substantially similar to any of the Batmans  
23 that we have seen previously.

24 THE COURT: Sorry. It's the same character. It's  
25 just at an older age in his life cycle, but it's the same

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1 Batman, right?

2 MR. PARKER: I would --

3 THE COURT: I mean, you tell me, but I think you  
4 acknowledged a couple of times now that the character of  
5 Batman is one that has been sufficiently delineated to be  
6 protected. Perhaps what you're saying is that you believe  
7 you're describing a different character altogether? I just  
8 don't understand.

9 MR. PARKER: Okay. Yeah. I think we have to back up.  
10 Let's look at the cases very quickly. Let's look at Judge  
11 Pauley's decision in *Sapon*. And so we have to be careful when  
12 we say Batman is protected. So if I say Batman as a character  
13 in my story. Batman, he is an old man. He fights crime.

14 THE COURT: Does he live in stately Wayne Manor?

15 MR. PARKER: He lives in Wayne Manor. He has a butler  
16 named Alfred. I disagree that that is sufficient delineation.  
17 I disagree that that is an expression of a copyrighted work.

18 THE COURT: He has got foes named Riddler and Joker.

19 MR. PARKER: He has got foes named Riddler and Joker.

20 THE COURT: He has a sidekick named Robin.

21 MR. PARKER: We don't have a Robin here. Your Honor,  
22 I would argue that these are names. These are names, and when  
23 we look at the actual pictures, what the characters look like,  
24 how they act, what they do, then that is not similar to what we  
25 see in the copyrighted works that are cited in these

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1 representations.

2 THE COURT: If that's the case, how could your  
3 copyright claim possibly survive?

4 MR. PARKER: Because my copyright claim is not  
5 dependent upon the names. My client's copyright claim is  
6 dependent upon, we have the Riddler, who is a villain, but he  
7 is not just the Riddler. He is the villain who is out to get  
8 Batman or out to get the main hero. He has come from the  
9 surrogate family. He is on this sort of biblical mission to  
10 show the truth. He believes he understands the secret identity  
11 of the hero, and he's going to expose him -- or the -- and the  
12 hero is afraid of this as well.

13 There are a number of other items that are -- that I  
14 think are, you know, not dependent upon the Batman universe but  
15 are present in the movie that would be sufficiently infringing.

16 THE COURT: In effect what you're saying is that the  
17 movie traffics more closely in your Batman than your  
18 Batman traffics in the Batman that is the subject of the  
19 copyright registrations?

20 MR. PARKER: I would like to steer clear of using  
21 these names, Batman and Robin, for the characters because these  
22 are names not necessarily characters.

23 THE COURT: Well, I mean, that what's good for the  
24 goose is good for the gander. If that's the case, if you strip  
25 away Batman, you are dealing with narrative arcs that are put

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1 at such a high level of generality, it's hard to imagine that  
2 your client's work, the story, could preclude anything.

3 MR. PARKER: I disagree, and I think -- but we're at  
4 this problem --

5 THE COURT: You are probably knocking out some Indiana  
6 Jones movie out there or something, and there's just a bunch of  
7 stuff out there that involves heroes and villains and secrets  
8 and plots. It would have seemed to me that the outer bounds  
9 that you could be claiming here, assuming there was no prior  
10 work by somebody else, would have involved Batman as opposed to  
11 just the very broadly put story arc. Do you have some  
12 authority for this?

13 MR. PARKER: Well, I do, *Nichols v. Universal*  
14 *Pictures*, you know. You have Judge Learned Hand and also Judge  
15 Pauley in *Sapon* saying, you know, we have to -- if you look at  
16 the very abstract level, then nothing is protected. You know,  
17 bad man fights hero. All right? But as we sift it down to  
18 more specifics, we do have something that is protectable with  
19 my client's story. So we have this aging hero. He's, you  
20 know, considering giving up and quitting crime fighting. That  
21 is not too abstract. I think that is -- that is, when compared  
22 to this notion of he's about to be found out, he is afraid.  
23 He's afraid that his identity and his alter ego is going to be  
24 discovered.

25 THE COURT: I'm sorry. In the film that you're

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1 claiming is infringing, I thought Batman was early in his  
2 career, not an aging hero?

3 MR. PARKER: He is not aging. All right? It's  
4 flipped, but you still have the same doubt and trepidation.  
5 You don't have the same confidence that you would normally  
6 have. So there's this very similar doubt; this idea that, oh,  
7 I'm going to retire. I'm going to give up what -- I'm going to  
8 sign over Wayne Industries or this big foundation. I'm going  
9 to give up these tropes of being very wealthy and being very  
10 privileged. And then -- that's on the hero side. But then on  
11 the villain side, you have this very desperate loner, serial  
12 killer, who is desperate for attention, who wants the attention  
13 of Batman or the attention of the hero, who puts him in  
14 different trials, who commits these murders and these serial  
15 killings and is bent on this destruction.

16 I think these expressions, these storylines, these  
17 plots are similar to both. And when you look at them all  
18 together, it's pretty uncanny that they are all present in the  
19 movie in addition to my client's short little story.

20 THE COURT: Shifting gears to the registration, does  
21 the record say anything about the registration process and what  
22 your client was presented with in terms of, you know,  
23 instructions/questions as he registered the story?

24 MR. PARKER: The record does not, your Honor. And  
25 I -- I think you would have had to have taken screen shots to

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1 determine what questions were asked.

2 THE COURT: Or to have an expert as to what was being  
3 asked at the time. Your client registered this in 1990?

4 MR. PARKER: Your Honor, the registration wasn't made  
5 until after he --

6 THE COURT: That's right. It wasn't registered until  
7 when, 2000 and what?

8 MR. PARKER: I believe it was 2022.

9 THE COURT: All right. So your client registered it a  
10 year to two ago. That would presumably not have been hard  
11 to reconstruct what the electronic registration -- I take it he  
12 registered it electronically?

13 MR. PARKER: He did, your Honor. It is my  
14 understanding that he did, your Honor.

15 THE COURT: Did he testify at all at his deposition  
16 about the process of registration?

17 MR. PARKER: I do not recall testimony as to the  
18 process of registration, the questions you're asking. But I  
19 can say, your Honor, my client is very convinced that he has  
20 registered an original work and that this is his story.

21 THE COURT: Be that as it may, was there any testimony  
22 about his state of mind in not saying anything about other  
23 Batman works or about his prior working relationship with DC  
24 Comics? Did he testify one way or the other about those  
25 subjects?

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1 MR. PARKER: Did he testify in terms of his prior work  
2 with DC Comics. He did not testify -- he did not testify as to  
3 how he registered the works and what he was thinking and  
4 whether or not he considered his prior work with DC Comics when  
5 he registered his work.

6 THE COURT: Are you contending that his registration  
7 gets him any evidentiary mileage here given that the  
8 registration was 30-plus years after the ostensible creation of  
9 the story?

10 MR. PARKER: I'm not sure what the law is on the time  
11 span from the creation up to the registration with respect to  
12 the *prima facie* benefits that you get from the registration,  
13 your Honor, but my client has testified that he -- when you're  
14 talking about ownership and when you're talking about a patent,  
15 for example, and the certificate, the certificate of patent  
16 gives you a property. When you register a copyright, the  
17 certificate of registration does not give you a property. The  
18 property arises upon the creation of the work. So the  
19 certificate's value is it allows you to come to federal court  
20 and state your case. If you register -- prior to --

21 THE COURT: If you register it within five years,  
22 there's a presumption of validity, right?

23 MR. PARKER: Correct.

24 THE COURT: Presumption of -- is it validity?

25 MR. PARKER: It is presumption of ownership and



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1 validity.

2 With respect to the registration, if you register  
3 prior to the infringement, you know, you get attorney's fees  
4 and you get statutory damages. Those are not the case here,  
5 but registration doesn't give a property right. And in terms  
6 of scienter and belief, my client certainly believes that his  
7 work is not infringing.

8 THE COURT: In his deposition, as opposed to  
9 elsewhere, did he testify at all about his state of mind in the  
10 course of doing the registration?

11 MR. PARKER: He did not, your Honor.

12 THE COURT: I mean, in other words, if you were on  
13 summary judgment being asked to point to admissible evidence in  
14 which you were asked to infer a lack of fraudulent intent, what  
15 would you point to?

16 MR. PARKER: I would point to the fact that throughout  
17 the deposition, it is clear that my client firmly believes that  
18 this is an original work of art, that it is not a derivative.  
19 It is not -- it does not belong to someone else.

20 Now, let's look at the -- he did sign work-for-hire  
21 agreements in the 1990s. Those work-for-hire agreements do  
22 say, and he acknowledges, that he is committing this -- he is  
23 creating this work. It will belong to DC Comics, and all  
24 preexisting material belongs to DC Comics.

25 THE COURT: And he's working for DC Comics shortly

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1 after 1990, right?

2 MR. PARKER: Throughout the '90s.

3 THE COURT: And therefore, the preexisting material  
4 that he is referring to?

5 MR. PARKER: Who knows.

6 THE COURT: Well, suppose that the 1990 work that he  
7 had written was conceded by you—just go with it—to be  
8 infringing a copyright either in the Batman or in the  
9 surrounding narrative. Under the work-for-hire agreement,  
10 would that mean that he's ceding anything to his preexisting  
11 work, or is the preexisting work that is referred to in the  
12 work-for-hire agreement referring only to that which belonged  
13 to DC Comics?

14 MR. PARKER: I apologize, your Honor. I'm not quite  
15 following the question.

16 THE COURT: You had said something about the  
17 work-for-hire agreement having him disclaiming something about  
18 preexisting works. I'm trying to understand what you're  
19 referring to.

20 MR. PARKER: I'm referring to the contract that  
21 Mr. Weinberger is citing as evidence that my client knows his  
22 work is infringing. And my point is that the language in this  
23 contract is not all that clear. There's certainly no  
24 indication that my client knows that his work is infringing and  
25 he's not allowed to -- not allowed to create this particular

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1 work.

2 THE COURT: Right. I don't think Mr. Weinberger is  
3 saying that to show fraudulent intent in connection with the  
4 registration, your client needs to know that he is infringing.  
5 It's more that it's the nondisclosure of the work-for-hire  
6 agreements or the other parts of the Batman canon that are what  
7 make it fraudulent.

8 MR. PARKER: Your Honor, I think that the registration  
9 process requires you to disclose that your work is like based  
10 on a preexisting work. And I think my client would argue that  
11 his -- and I'm here to argue that his work is not based on a  
12 preexisting work. His story is a new and original story.

13 THE COURT: About a preexisting character?

14 MR. PARKER: It uses names. It uses names, your  
15 Honor.

16 THE COURT: I appreciate that it's using names. We  
17 all can follow that.

18 Are you saying, though, that the Batman in your  
19 client's work is not based on a preexisting character, Batman?

20 MR. PARKER: I think what you have to do is you have  
21 to ask is it substantially similar to the Batman that we see  
22 sufficiently delineated --

23 THE COURT: Okay. Let's go with that.

24 MR. PARKER: -- and my point is it is not.

25 THE COURT: It's not just because he is at a different

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1 place in his journey or because it's really a different  
2 character?

3 MR. PARKER: I think it's a different character, your  
4 Honor.

5 THE COURT: They both happen to live in Wayne Manor.  
6 They both happen to have Alfred as their butler. They both  
7 happen to have enemies named Riddler and The Joker. They both  
8 live in Gotham City. At what point is that really defensible  
9 to say that they're different characters as opposed to same  
10 character, different story?

11 MR. PARKER: I think when you -- when you see he's an  
12 old man. When he doubts whether he is conning Gotham and the  
13 city. When he is dealing with -- when the Riddler is a serial  
14 killer as opposed to the Riddler that we've seen before. I  
15 mean, these are different characters. These are not the same  
16 characters. They have the same name, but they're different  
17 characters.

18 THE COURT: Anything else on any of the claims you  
19 want to bring to my attention today?

20 MR. PARKER: I would, your Honor. I would like to  
21 point out an issue of ownership that we discussed earlier. One  
22 is the chain of title issue. There's nothing to connect these.  
23 The other issue is authorship. As has been admitted, this is a  
24 joint work by two people, Bob Finger and -- sorry, Bill Finger  
25 and Bob Kane.

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1 THE COURT: Both though on behalf of DC Comics, no?

2 MR. PARKER: We don't have any factual record of that.  
3 And it is clear that from testimony from DC Comics that at the  
4 time of the creation, they were not employees. So that's --

5 THE COURT: Where is that clear from?

6 MR. PARKER: That is in the deposition from DC Comics.  
7 So the work was created in '39.

8 THE COURT: Does DC Comics say they weren't agents of  
9 DC Comics at the time?

10 MR. PARKER: There's no discussion of agency. The  
11 question is whether or not they were employees, and they were  
12 not employees when they created it. They later became  
13 employees. One of the writers was -- or the illustrator was  
14 actually compensated later on, and his estate was compensated  
15 later on. The writer, Bill Finger, he was never compensated.

16 THE COURT: Sorry. Is the theory here that everyone  
17 has been wrong all this time and that DC Comics didn't own the  
18 original Batman; it's been owned all this time by these two  
19 late individuals?

20 MR. PARKER: Yes, your Honor. This was a joint work  
21 by two individuals, one of whom was compensated.

22 THE COURT: But this is an original work.

23 MR. PARKER: Your Honor, I'm, unfortunately, not the  
24 first person to say this. There are a lot of comic book nerds  
25 on YouTube who say the same thing.

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1 THE COURT: All right. Thank you. Anything further?

2 MR. PARKER: Yes, your Honor. There are a couple of  
3 things if you don't mind?

4 THE COURT: No, go ahead.

5 MR. PARKER: With respect to like derivative works, I  
6 disagree with my colleague. I think Sections 103(a) and 103(b)  
7 do contemplate—and I'm following Judge Pauley in the *Sapon*  
8 decision—the idea that a derivative work can have an  
9 infringing element but also a protected element in that work.  
10 I think that in a situation where the infringing portion of the  
11 work dominates the work, then there's no protection. But --

12 THE COURT: If that's right though, why does your  
13 client then, to the extent that the story is pitched outside of  
14 Warner Brothers, strip out the Batman references?

15 MR. PARKER: Your Honor, I think if you -- well, he  
16 stripped out the Batman references because he was trying to  
17 sell it to a -- he was trying to sell it to another company who  
18 had a different character, so he just changed the names and  
19 tried to sell it.

20 THE COURT: Well, did he believe that if he had sold  
21 it as Batman, that other company might have perceived an  
22 intellectual property limitation to their using his script?

23 MR. PARKER: That I cannot answer, but he did believe  
24 that they had a black hawk series, so he was pitching it as a  
25 black hawk series. Actually -- ShadowHawk. That's the other

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1 thing, your Honor. I think if you take out the names of my  
2 client's work, if you take out Batman, if you take out Riddler,  
3 there's no case here. There's no infringement case by DC  
4 Comics against my client. So it's all based on the names, not  
5 the relationships, not what they do, not how they act, not how  
6 they talk, not how the plot moves.

7 THE COURT: All right. Thank you.

8 MR. PARKER: All right.

9 THE COURT: Mr. Weinberger, a handful of things I know  
10 you are going to want to return to based on the colloquy that  
11 has just been had. But just to start where we left off with  
12 you --

13 MR. WEINBERGER: Yes.

14 THE COURT: -- have you been able to reconstruct  
15 anything in the record about the registration process?

16 MR. WEINBERGER: Yes, your Honor. So a couple of  
17 things. One is that electronic record of the registration is  
18 the only thing that was produced by Mr. Wozniak, so that's all  
19 we have. But as for what is required in the copyright process,  
20 I thank my colleague for reminding me of it. And my mentor  
21 taught me this—I wish I had thought of it when I was under the  
22 gun a few minutes ago—always go back to the statute when  
23 you're stuck.

24 So at page 22 of our brief, we cite Section 409(9) of  
25 the Copyright Act, which lays out the requirements for what you

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1 are supposed to put in an application. And Section 9 says, in  
2 the case of a derivative work, an identification of any  
3 preexisting work or works that it is based on or incorporates  
4 in a brief general statement of the additional material covered  
5 by the copyright claim being registered. So we cite this at  
6 page 22 of our moving brief, and we also cite language from the  
7 compendium, which is like a manual that supports the copyright  
8 act in terms of giving practitioners and filers guidance that  
9 talks about what unclaimable material includes. It includes  
10 "copyrightable material that is owned by a third party, i.e. an  
11 individual or legal entity, other than the claimant who is  
12 named in the application."

13 THE COURT: Right. But if you have a registrant,  
14 Mr. Wozniak, who may not be legally trained, what puts him on  
15 notice of what Section 409(9) required him to do or the  
16 compendium's distillation of that?

17 MR. WEINBERGER: All I can say is I know what the  
18 screen says. I think Mr. Parker said as much.

19 THE COURT: No, I know. Look, I mean -- go ahead.

20 MR. WEINBERGER: I apologize. Thank you.

21 In the record in Mr. Wozniak's deposition, which is  
22 attached to my declaration, there's a Q&A at page 102:  
23 "Q. Do you recall when you filed this being given an  
24 opportunity to disclose preexisting material?  
25 "A. Yes, I do believe that's a question.



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1 "Q. You declined to disclose preexisting material?

2 "A. My story is not based on anything from DC."

3 MR. WEINBERGER: Question -- and then the question and  
4 answer goes on to things that are in his story. I can continue  
5 to read. This is at page --

6 THE COURT: But the implication being that he  
7 acknowledged the question is put in terms of being given an  
8 opportunity. I take it the implication being that it's not  
9 merely an opportunity; it was an obligation?

10 MR. WEINBERGER: That's our position, yes.

11 THE COURT: Although the question, as put to him, is  
12 not that precise.

13 MR. WEINBERGER: No.

14 THE COURT: Look, the challenge for you,  
15 Mr. Weinberger, is the fraudulent intent. And that's a  
16 subjective inquiry that is being made about the registrant.  
17 Did he or did he not act with fraudulent intent?

18 MR. WEINBERGER: Well, the answer to his question was:

19 "A. My story is not based on anything from DC."

20 MR. WEINBERGER: The next question was:

21 "Q. Is the Batmobile not from DC?

22 "A. The Batmobile is traditionally portrayed as a DC thing.

23 "Q. And Commissioner Gordon?

24 "A. Yes.

25 "Q. And Batman?

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1 "A. Yes."

2 THE COURT: So your point is --

3 MR. WEINBERGER: He knew it.

4 THE COURT: -- the finder the fact would find the  
5 denial of anything being based on DC to be a lie, and  
6 therefore, to backout from that, then he must have been acting  
7 with fraudulent intent in not disclosing preexisting material?

8 MR. WEINBERGER: Yes. But I don't think the Court is  
9 required to make a determination about his credibility in order  
10 to reach that finding based on other testimony in the record  
11 and the contracts. That's our position.

12 THE COURT: Right. Right. I'm trying to get in the  
13 moment of his filling out the registration form. And since I  
14 think you are acknowledging that to prevail on that claim, you  
15 need to show fraudulent intent, meaning, subjective, him at  
16 that moment.

17 The question is what we can back that out from. If  
18 you had a question on the form that said you must disclose any  
19 preexisting material, and then you have him, from your  
20 perspective, falsely denying the existence of preexisting  
21 material, that's pretty good. That might get you there. The  
22 way you reported the depo question to me is something short of  
23 an obligation. He was given an opportunity to. He chose not  
24 to do it. It's not quite as clear as you'd want it to be that  
25 he is basically being told you've got to disclose it.

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1 MR. WEINBERGER: Well, I can't speak for Mr. Wozniak's  
2 state of mind. I can tell you what the record shows in  
3 addition to these questions about his state of mind, about who  
4 owned Batman. I think the Court noted when he went to another  
5 publisher, he stripped out Batman. He did that for a reason.  
6 He knew he would get in trouble.

7 THE COURT: And when was that relative to the  
8 registration process? When did he go to the other publisher?

9 MR. WEINBERGER: I think that was in the 1990s. It  
10 was years before the registration.

11 THE COURT: Okay. All right. Go ahead.

12 MR. WEINBERGER: I only wanted to address a few other  
13 points very briefly.

14 THE COURT: Yes.

15 MR. WEINBERGER: I think the question about chain of  
16 title has been answered. The *Muller* case and some others talk  
17 about corporate testimony resolving any chain of title  
18 concerns. The testimony in the Kogan declaration resolves  
19 this. There's been no response.

20 THE COURT: Chain of title, this means the theory that  
21 Batman never came to be owned by DC Comics?

22 MR. WEINBERGER: Well, there's two issues. There's  
23 the fact that many of the registrations list National  
24 Periodical Publications or Detective Comics, which are  
25 predecessor entities to DC Comics. That is dealt with in

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1 Mr. Kogan's testimony.

2 The second question that Mr. Parker raised about  
3 authorship. I query whether Mr. Wozniak has the ability to  
4 challenge on behalf of Bob Kane and Bill Finger who the owner  
5 of Batman is. I don't think he belongs in that discussion.  
6 But in any event, that is a long-settled question. My clients  
7 filed copyrights in its own name for these properties for  
8 years. And Mr. Wozniak was given copies of some of the  
9 underlying agreements with these writers and artists that  
10 confirm all of the above, so I don't think there's any issue  
11 here.

12 THE COURT: Somewhat separate, somewhat related, early  
13 in the argument from Mr. Parker, he said, I believe, that there  
14 were only two copyright certificates, I think, that had been  
15 filed and was suggesting that there was some inexactitude about  
16 what the relationship was between them and the story?

17 MR. WEINBERGER: No, I -- well, Mr. Parker can answer  
18 that.

19 We have about, I think, 25 certificates that are part  
20 of the record. There are only two that say DC Comics on them  
21 because most of them predate the existence of the entity known  
22 as DC Comics.

23 THE COURT: I see.

24 MR. WEINBERGER: I do that Mr. Parker's point is that  
25 his client -- and he and I have been talking about this since

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1 day one of this case. His client continues to ask: What work  
2 am I infringing? And our answer remains all of them.

3 THE COURT: In other words, all of them, each  
4 individual one, standing on its own if nothing else existed,  
5 would give you a copyright in this Batman character and  
6 surrounding associations?

7 MR. WEINBERGER: Well, I'm not sure I can answer that.  
8 I can tell you that a single certificate would get us into  
9 court on our affirmative claim against Mr. Wozniak. As to what  
10 you would need to be able to prove character rights in a  
11 particular property, it's -- that's an impossible question to  
12 answer. It depends on what the character is, what the property  
13 is. It might be able to be done in a single work like these  
14 novels. You know, comics, it takes more because there's less  
15 on the page and it's shorter. But I certainly believe that  
16 with the material before the Court and the prior precedent,  
17 there's really no question about it.

18 The last point I did not get to touch in my earlier  
19 discussion about issues about access and independent creation,  
20 which I don't need to get into. I just wanted to --

21 THE COURT: Yes. I read what you wrote. I didn't  
22 have questions on that.

23 MR. WEINBERGER: The last point I wanted to make is  
24 really building on something Mr. Parker said and your  
25 interaction, which is the position in order avoid the

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1 consequence of the infringement of DC Comics copyright by the  
2 story, Mr. Wozniak has had to really twist and contort and say,  
3 well, my Batman is different from your Batman. That's the way  
4 he is a non-infringer. And we don't agree that that is the  
5 proper analysis. But I do want to say this: If that's the  
6 proper analysis, if the Court is accepting it, there's no world  
7 in which the film that my client is accused of infringing could  
8 possibly infringe something that is not, according to  
9 Mr. Wozniak, derivative of my client's rights.

10 THE COURT: His argument is that even if you strip  
11 away all the identifiers, the narrative ark is sufficiently  
12 specific and similar across the two that that would be the  
13 source of an infringement claim.

14 MR. WEINBERGER: Well, we certainly understand that  
15 argument. I think the works can speak for themselves. One can  
16 read the works and watch the movie, and it doesn't take long to  
17 understand that while they may have certain high-level plot  
18 similarities as it relates to films with villains and heroes  
19 and villains who taunt heroes and Armageddon-type-judgment-day  
20 endings, which most action movies have in some form or another,  
21 you won't find the kind of similarities that are actionable.

22 THE COURT: Anything further?

23 MR. PARKER: From me, your Honor?

24 THE COURT: No, from Mr. Weinberger. Anything  
25 further?

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1 MR. WEINBERGER: No, your Honor.

2 THE COURT: Mr. Parker, anything further from you?

3 MR. PARKER: Yes, I just wanted to go back to the  
4 statute of limitations and the arguments of implied license,  
5 which are in our papers, but, you know, there certainly was an  
6 implied license. My client was working day-to-day with the  
7 editors at DC Comics.

8 THE COURT: Applied license to do what?

9 MR. PARKER: Applied license to create material based  
10 on preexisting Batman characters and submit to DC Comics.

11 THE COURT: But implied license to submit it to DC  
12 Comics; are you saying that there was an implied license to  
13 peddle it to the outside world for your client's benefit?

14 MR. PARKER: Your Honor, that's a very good point.  
15 I'm glad you raised it. This is something that you and  
16 Mr. Weinberger were discussing.

17 When we're talking about infringement, we're not  
18 talking about claims of ownership. We're not talking about the  
19 ability to submit it for commercial -- for commercial benefit.  
20 We're talking about: Did you copy? Did you distribute? Did  
21 you publicly display? Those are the rights. The copyrights  
22 are set forth in Section 106. And Section 106 does not say,  
23 oh, the right to claim ownership. Section 106 does not say,  
24 oh, you're not allowed to -- you're not allowed to submit for  
25 payment this work. So that's what we're talking about. So

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1 we're talking about he had an implied license to use these  
2 materials to create, to distribute and to publicly display  
3 these works of art.

4 THE COURT: All right. Thank you. The case is  
5 submitted. I thank counsel for the energetic and helpful and  
6 insightful argument, and you'll hear from me relatively soon.  
7 Thank you. We stand adjourned.

8 (Adjourned)